R.D. #0008-06
Cliffside Park, NJ

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22

CARLYLE TOWERS CONDOMINIUM ASSOCIATION
Employer

and CASE 22-RC-12699

LOCAL 621, UNITED CONSTRUCTION TRADES AND INDUSTIAL EMPLOYEES UNION, IUJAT[1]
Petitioner

and

LOCAL 734, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA[2]
Intervenor

DECISION AND ORDER

I. INTRODUCTION:

The Petitioner filed a petition, amended at the hearing, under Section 9(c) of the National Labor Relations Act, seeking to represent a unit of all service and maintenance employees employed by the Employer at its Cliffside Park, New Jersey facility but excluding all office clerical employees, managerial employees, guards and supervisors as defined by the Act.[3] The Employer and the Intervenor both assert that

[1] The name of the Petitioner appears as amended at the hearing.
[2] The name of the Intervenor appears as amended at the hearing.
[3] The unit appears as amended at hearing and stipulated to by all parties.

the petition should be dismissed as the Memorandum of Agreement for contract renewal (MOA) between them bars the petition here. The Petitioner asserts that the MOA should not bar the petition for the following reasons: it was not ratified pursuant to its terms; changes to the contract subsequent to the MOA were neither presented to the membership nor ratified; and the collective bargaining agreement has not been signed by the parties.

I find, for the reasons described below, that the MOA between the Employer and the Intervenor is a bar to an election in this matter, and therefore, the petition must be dismissed.

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National labor Relations Board. Upon the entire record in this proceeding,[4] I find:

1. The hearing officer's rulings are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.[5]

3. The labor organizations involved claim to represent certain employees of the Employer.[6]

[4] Briefs filed by the Intervenor and the Petitioner have been considered. No other briefs were filed.
[5] The Employer is a New Jersey not for profit corporation engaged in the operation of a two tower condominium complex at its Cliffside Park, New Jersey location, the only location involved herein.
[6] The parties stipulated and I find that the Petitioner and the Intervenor are labor organizations within the meaning of Section 2(5) of the Act. The Intervenor was permitted to intervene based on its expired collective bargaining agreement and the MOA, which covers the petitioned-for employees.

4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act, for the following reasons:

II. FACTS

The Employer has recognized the Intervenor as the collective bargaining representative for a unit of service and maintenance employees for the past 15 years and the parties executed successive collective bargaining agreements preceding the MOA. The most recent collective bargaining agreement (CBA) was effective August 13, 2002 to August 12, 2005. The Petitioner seeks to represent a unit identical to the one defined in the CBA, which currently consists of about 20 employees.

The MOA is a hand-written list of changes to the expired CBA which was prepared by Tim Fritzsch, Intervenor's former Business Agent. Fritzsch was responsible for administering the CBA and acted as the Intervenor's primary negotiator for the MOA. It is undisputed that the MOA, dated November 26, 2005 was signed by the Intervenor and the Employer.[7] Fritzsch was replaced as Business Agent serving the Employer's employees by Ana Tavares in January 2006.

The MOA provides for a new three year agreement ending August 12, 2008 upon the same terms as the prior CBA, except for the following itemized changes: (1) a wage increase; (2) an increase is the welfare plan contribution; (3) an increase in the pension fund contribution; (4) a continuation of discussion regarding non-economic

[7] Tim Fritzsch left the Intervenor's employ at the end of calendar year 2005. Intervenor has not maintained contact with him and he was not called to testify. The Employer, represented by counsel and Building Manager Candi Gorny, called no witnesses.

terms[8] and provisions for approval by the Board of the Carlyle Towers and ratification by the Intervenor's membership. It was left to Tavares to prepare a complete collective bargaining agreement based on the MOA.

After Fritzsch left the Intervenor's employ, the MOA and other documentation, including the prior collective bargaining agreement, attendance sheet for the ratification meeting conducted on November 30, 2005, and the employee ballots, remained in the Intervenor's files, as is customary for business records. In early 2006 Tavares retrieved these documents from the file to prepare the new CBA. In the interim, the Intervenor had made a business decision to contract out it health and welfare service, resulting in a single, lesser rate for individual and family coverage as opposed to the prior two-tiered rate under the previous CBA. Tavares went to the Employer's location and met with shop steward Nelson Pinada. She explained the changes in the health and welfare plan and together they met with new Building Manager Candi Gorny[9] and her immediate superior, Elizabeth Commando. The Intervenor attempted to negotiate a change in the wage rate by asking that the approximately $40.00 per week savings the Employer would enjoy from the change in the health and welfare plan be given to the employees in their paychecks. The Employer would not agree. Tavares estimates that meeting as having taken place on February 9, 2006. Thereafter, in or about April 7, 2005, in preparing the final contract, Tavares asked Gorny to confirm the language that had

[8] Subsequently, Fritzch noted in a copy of the MOA that the parties agreed that there would be no changes in the non-economic terms of the contract, and initialed it. This understanding is undisputed. Petitioner asserts that changes to the disciplinary and grievance procedures made subsequent thereto are contrary to this understanding. However, it is undisputed that the agreed upon language regarding disciplinary and grievance procedures was agreed to by the Employer and the Intervenor after the MOA and prior to the drafting of the collective bargaining agreement, indicating at most an agreed to mid term modification.

[9] Alex Butkovic, who had been the Building Manager until the end of 2005, negotiated the MOA with Tim Fritzsch. Neither of them was called as witnesses and no subpoenas were issued for them.

been agreed to by the parties regarding the changes in disciplinary and grievance procedures. Gorny did so and that language is reflected in the new collective bargaining agreement which was prepared.

There is no direct evidence regarding the bargaining and ratification processes, as the two individuals who negotiated the MOA are no longer employed by their respective parties. The shop steward, Nelson Pinada, was not part of the bargaining process, as his second job was not compatible with the parties' bargaining schedule. Thus, business records are the next most reliable evidence proffered in this case. Intervenor offered the signed MOA as evidence of the fact that an agreement had been reached between the parties on November 26, 2005. In support of it position that the MOA had been duly ratified by the bargaining unit, the Intervenor offered the sign-in sheet from the ratification meeting, indicating that 11 bargaining unit members attended. The record reflects that the secret ballots indicating an 11-0 vote for the new contract were collected at the ratification meeting held on November 30, 2005, four days after the MOA was signed. The sign in sheet and ballots were maintained in the Intervenor's files. But, Intervenor's shop steward, Nelson Pinada, testifying for Petitioner, claimed that no ratification vote was held, although he acknowledged that he did not attend the meeting and based his testimony on what he was told by employees he asked. No other witnesses testified regarding ratification.

In opposing contract bar, the Petitioner contends that the conditions contained in the MOA were not implemented in that there was no ratification by the bargaining unit; the economic and non-economic terms contained is the CBA do not reflect the MOA;

and the collective bargaining agreement was neither signed nor ratified. I note for the record that the CBA itself does not contain a ratification clause.

The collective bargaining agreement, although still unsigned at the time of the hearing, was implemented by the parties in March, 2006. Intervenor's witness, Business Agent Ana Tavares, testified that she was aware of its implementation because employees' received an incorrect wage increase that resulted in a number of employee phone calls to her with consequent efforts on her part to assure payment of the correct wage rate. I note that the instant petition was not filed until May 23, 2006.

III. LEGAL ANALYSIS

The major objective of the Board's contract bar doctrine is to achieve a reasonable balance between the frequently conflicting aims of industrial stability and freedom of employees' choice. This doctrine is intended to afford the contracting parties and the employees a reasonable period of stability in their relationship without interruption and at the same time to afford the employees the opportunity, at reasonable times, to change or eliminate their bargaining representative, if they wish to do so. The initial burden of proving that a contract is a bar is on the party asserting the doctrine. *Roosevelt Memorial Park*, 187 NLRB 517 (1970).

The Board's contract bar rules are clear. To serve as a bar to an election, a contract must meet certain basic requirements; these requirements are set out in the Board's decision in *Appalachain Shale Products Co.*, 121 NLRB 1160 (1958). The contract must be written, signed by the parties, cover substantial terms and conditions of employment for the petitioned-for unit, be of definite duration and not exceed three years. Id. Further, it must "state with adequate precision the course of the bargaining

relationship" so that "the parties can look to the actual terms and conditions of their contract for guidance in their day-to day problems." Id. at 1163.

Here, I find that the Intervenor has met its initial burden by virtue of its signed written MOA with the Employer.[10] The MOA is of a definite three-year duration and contains substantial terms and conditions of employment. Although the parties have not executed the new collective bargaining agreement, by incorporating the previous CBA and the MOA, those two documents substantially resolve and stabilize employees' wages, hours and other terms and conditions of employment. Thus, on its face, the MOA appears to bar the processing of the petition. See *St. Mary's Hospital and Medical Center*, 317 NLRB 89 (1995*); USM Corp*., 256 NLRB 996, fn. 18(1981); *Gaylord Broadcasting Co*., 250 NLRB 198 (1980). Moreover, any differences between the MOA and the collective bargaining agreement are minor and do not engender confusion or uncertainty. As to the Intervenor's request that the difference in the health and welfare payment between those recorded in the MOA and those reflected in the contract, be reflected in the employees' pay checks amounts to no more than a request for mid-term bargaining, rejected by the Employer.

The record also contains no evidence that the parties otherwise ignored the MOA or in any way acted as if there was not a binding agreement. Accordingly, under these circumstances, the terms and conditions of employment of the employees appear to have remained fixed and stable pursuant to the parties' new agreement and, I find,

[10] Petitioner also alleges that there was no notification to the Employer of the results of the ratification vote. Tavares testified that the normal business routine for the Intervenor is to schedule a ratification vote, maintain a sign in sheet, collect the secret ballots and store them in its files. Once the ratification vote has taken place, the Business Agent then notifies the Employer. Intervenor asserts, and I have no reason to dispute, that the Intervenor followed its normal business practice.

that it would be inappropriate under the Board's contract bar principle to disturb them by processing the instant petition.

I note that the instant case is unusual in that there is no first hand testimonial evidence by any party as to the events that transpired. Both the Intervenor and the Petitioner rely on hearsay evidence to support their positions. In addition, the Intervenor has introduced into the record several business record exhibits, an exception to the hearsay rule, which support its hearsay evidence. Relying on *Alvin J. Bart & Co.*, 236 NLRB 242 (1978), I find that "administrative agencies ordinarily do not invoke a technical rule of exclusion but admit hearsay evidence and give it such weight as its inherent quality justifies." Moreover, the Board will admit hearsay evidence "if rationally probative in force and if correlated by something more then the slightest amount of other evidence." *RJR Communication*, 248 NLRB 920, 921 (1980), cited in *West Texas Hotels, Inc.*, 324 NLRB 1141, fn. 1 (1999). Thus, the hearsay evidence offered by Intervenor is amply supported by the business records introduced at hearing. In this regard, I find that clause 7.) in the MOA which states "All above is contingent to membership ratification" has been satisfied. When ratification by the union membership is a condition precedent to contractual validity by express contractual provision, the contract is ineffectual as a bar unless it is ratified prior to the filing of a petition.[11] *Kennebec Mills Corporation*, 115 NLRB 1483 (1956); *American Broadcasting Company*, 114 NLRB 7 (1955). However, for this condition to be operative, it must be express, otherwise prior ratification is not required. *Paperworkers Local 5 (International Paper)*, 294 NLRB 1168, fn. 1 (1989). Furthermore, prior

[11] As noted above, the ratification condition is part of the MOA, not the CBA.

ratification by the membership is required only when it is made an express condition precedent in the contract itself. *Appalachian Shale Products Co*., supra at 1162, 1163; *Merico, Inc*., 207 NLRB 101 (1973). In such circumstances, a report to the Employer that the contract has been ratified is sufficient to bar a petition. *Swift & Company*, 213 NLRB 49 (1974). Based on the above, I find that the Petitioner has not supported its contention that the collective bargaining agreement asserted as a bar was not properly ratified.[12] In particular, I note that there is no probative evidence that the collective bargaining agreement was not ratified as asserted by the Petitioner.

Additionally, I find the cases cited by the Petitioner inapposite. In *Waste Management of Maryland, Inc.*, 228 NLRB 1002 (2003), the Board held that reliance on a signed letter from the union without reference to which offer the union was accepting created confusion as to what the terms and condition of the contract were, certainly not the case here. *Seton Medical Center*, 317 NLRB 87(1995), is no more persuasive as that case involved no signed writing specifying the overall terms of the contract. *Branch Cheese*, 307NLRB 239 (1992) again involves confusion as to what offer was being accepted. As to *Merck and Co., Inc*., 102NLRB 1612 (1953) and *M&M Oldsmobile, Inc.*, 102 NLRB 903fn4 (1966), regarding the standards for ratification, I have indicated above that I find the documentary evidence sufficient support of ratification.

Based on the above and the record as a whole, I find that the MOA and the consequent collective bargaining agreement the Intervenor has with the Employer is a

[12] It should be noted that no party contends that ratification was not a condition precedent to reaching a final agreement between the parties. Accordingly, the above analysis has been based upon the apparently undisputed position of all parties that ratification was a condition precedent to reaching final agreement. Cf. *Auciello Iron Works*, 303 NLRB 562 (1991*; Childers Products Co.*, 276 NLRB 709 (1985).

bar to an election in this matter as it charts with adequate precision the course of the relationship between the parties and substantially defines the terms and conditions of employment of unit employees.

IV. ORDER

IT IS HEREBY ORDERED that the petition filed herein be, and it hereby is, dismissed.

V. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. The Board in Washington must receive this request by **July 12, 2006**.

Signed at Newark, New Jersey on June 28, 2006.

/s/ Gary T. Kendellen

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